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In The

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana; LINLEY E. PEARSON, Attorney General of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

vs.

GLEN THEATRE, INC., et al.; DARLENE MILLER, et al.; and CIVIL CITY OF SOUTH BEND, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether nude dancing as entertainment, performed indoors and before a willing audience, is expression entitled to First Amendment protection.

2. These Respondents rely upon the second question presented in the Petition for a Writ of Certiorari.

LIST OF PARTIES

These Respondents rely upon the list of parties as set forth in the Petition for a Writ of Certiorari.

Respondent Glen Theatre, Inc. has no parent or subsidiary companies to be listed.

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No. 90-26

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, Glen Theatre, Inc., Carla Johnson, and Gayle Ann Marie Sutro respectfully request this Court to deny the Petition for a Writ of Certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit, sitting en banc, entered in *Darlene Miller, et al. v. Civil City of South Bend, et al.*, Nos. 88-3006 & 88-3244, on May 24, 1990.

OPINIONS BELOW

These Respondents rely upon Petitioners' recitation of the opinions below, but add the judgment of the Seventh Circuit entered on May 24, 1990, as of yet unreported, which is reprinted as Appendix 1 herein.

STATEMENT OF THE CASE

These Respondents rely upon the Statement of the Case in the Petition for a Writ of Certiorari, with the exceptions as noted below.

The videotape of nude dancing that was submitted to the District Court below (referred to in Petition, pgs. 4 & 6), was submitted by the Plaintiffs in the matter of *Darlene Miller et al. v. Civil City of South Bend, Indiana et al.*, No. 88-3006, and was neither submitted nor relied upon by these Respondents in their action, *Glen Theatre, Inc. v. Civil City of South Bend, Indiana et al.*, No. 88-3244. To the extent that either the district court or the circuit court of appeals indicated that these Respondents relied upon that videotape, such conclusion is in error. These Respondents, rather, relied upon the affidavit of Gayle Ann Marie Sutro (referred to in Petition, p. 4), attached as Appendix 2.

In addition, the reference at page 6 of the Petition is in error when it indicates that the Seventh Circuit, in its second decision on these matters, "ignored" the finding the District Court was instructed to make on remand. Rather, the Seventh Circuit, in its second decision in these matters, held that an unintended ambiguity existed in its first decision, which had confused the district court in its

duty and role upon remand. *Miller v. Civil City of South Bend*, 887 F.2d 826 (1989) (Petitioners' Appx. 117-119).

REASONS FOR DENYING THE WRIT

I. THE ISSUE OF WHETHER NUDE DANCING AS ENTERTAINMENT, IS A CONSTITUTIONALLY PROTECTED FORM OF EXPRESSION IS AN ISSUE THAT HAS PREVIOUSLY BEEN RESOLVED BY THIS COURT, AND THE DECISION OF THE SEVENTH CIRCUIT BELOW DIRECTLY FOLLOWS THE PRECEDENT SET BY THIS COURT AND IS IN CONFORMITY WITH THE MAJORITY OF LOWER COURTS THAT HAVE ADDRESSED THIS ISSUE.

A. THE ISSUE OF WHETHER NUDE DANCING IS "EXPRESSION," AND, THEREFORE, ENTITLED TO FIRST AMENDMENT PROTECTION, HAS PREVIOUSLY BEEN RESOLVED BY THIS COURT.

The simple issue below was whether nude dancing as entertainment, performed indoors and before a willing audience, was a form of expression warranting protection under the first amendment.

This Court has long and often held that entertainment enjoys first amendment protections. *Winters v. New York*, 338 U.S. 507, 510 (1947); *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 578 (1977). In addition, in a line of cases discussed in the State of Indiana's Petition for a Writ of Certiorari, this Court first implicitly, and then explicitly held that nude dancing as entertainment was not without first amendment protections. *See*, among others, *California v. LaRue*, 409 U.S. 109, 118 (1972); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-933 (1975); and

Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65-66 (1981). The exclusive limitation recognized by this Court of the constitutional protection afforded nude dancing is found when such entertainment is combined with the sale of alcoholic beverages. This Court has unequivocally indicated that *in those circumstances*, nude dancing may be prohibited under the State's inherent power to regulate the sale of alcoholic beverages conferred by the Twenty-first Amendment to the United States Constitution, which *outweighs*, in such circumstances, the interest in free expression by nude dancing. *LaRue, supra*, at 118, *Doran, supra*, at 932-933, *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 716-718 (1981); *City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92, 97 (1986).

If nude dancing, performed as entertainment before a willing audience was not "expression" warranting protection under the first amendment, this Court need not have resorted to the inherent powers of the twenty-first amendment in order to sustain the legislation at issue in *LaRue, Doran, Bellanca*, and *Iacobucci*. Rather than indicating that the powers of the twenty-first amendment (to regulate alcohol) *outweigh* the first amendment concerns of nude dancing, this Court could simply have concluded that this form of nude dance entertainment was devoid of Constitutional protection and, therefore permitted, *on that basis*, any form of regulation (or exclusion) of it.

As noted by one author:

> "The extensive treatment in *LaRue, Schad*, and *Bellanca* concerning the distinction between nude dancing occurring in an establishment which serves alcohol and in an establishment which does not would be *pointless* if nude entertainment were not entitled to a first amendment protection in either establishment." Been, *Erhardt v. State: Nude Dancing Stripped of First Amendment Protection*, 19 Ind.L.Rev. 1,8 (1986) (emphasis added).

The logical conclusion to be drawn by these decisions is that if not for the inherent powers under the twenty-first amendment, the legislation at issue in those holdings would violate first amendment protections. *Iacobucci*, at 99, Stevens J., dissenting.[1]

This Court's plurality opinion in *FW/PBS v. City of Dallas*, 493 U.S. ___, 107 L.Ed.2d 603 (1990), similarly indicates that nude dancing is a form of expression entitled to first amendment protections. In listing various prior decisions holding certain types of expression to be constitutionally protected, this Court cited *Schad, supra*, for the proposition that nude dancing is, indeed, such protected expression. *Id.*, at 617.[2]

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[1] For this reason, Petitioners are in error that the legislation at issue can be considered to be a valid content-neutral time, place or manner regulation.

[2] The Petitioners are in error when they indicate that "[t]he reference to *Schad* merely points out the probable basis for the City's concession." Petition, at 10. When referring to *Schad* in *FW/PBS*, this Court was not enumerating the basis of the concession by the City of Dallas as to the constitutional protections of the various modes of expression at issue there, but was rather outlining previous holdings that *confirmed* that the enumerated forms of expression, indeed, warranted First Amendment protections.

In *Sable Communications v. FCC*, 492 U.S. ___, 106 L.Ed.2d 93 (1989), this Court further held that "sexual expression which is indecent but not obscene is protected by the First Amendment." *Id.*, 106 L.Ed.2d at 105. Given that the nude dancing here at issue was stipulated to be non-obscene, there is no other conclusion but that it was entitled to presumptive constitutional protection, and the statute at issue (Ind. Code Section 35-45-4-1), which totally prohibits non-obscene nudity under all circumstances, is unconstitutionally overbroad when applied to nude dancing as expression. The decisions of this Court can lead to no other conclusion.

B. THE SEVENTH CIRCUIT'S HOLDING IS NEITHER NOVEL NOR DOES IT "POTENTIALLY INVALIDATE" INDECENCY OR NUDITY STATUTES IN MANY STATES

Petitioners' basic position is that non-obscene nude dancing is not entitled to protection from criminal proscription under the First Amendment of the United States Constitution, as it is not imbued with sufficient communicative content to be considered protectable "speech" or "expression." The gravamen of Petitioners' argument therefore must be that *dance*, as entertainment, in and of itself, is not "expression" such as to warrant constitutional protection. This assertion must necessarily underlie the Petitioners' theory, given this Court's repeated pronouncements that "nudity alone does not place otherwise protected material outside the mantle of the first amendment". *Schad, supra*, at 66, and cases cited therein. In asserting this contention, Petitioners argue that the Seventh Circuit decision, affording constitutional protection

to non-obscene nude dance entertainment, performed indoors and before a willing audience, is a "novel holding." Petition, at 10. Petitioners are in error.

Not only does the decision of the Seventh Circuit below directly follow the holdings of this Court in *LaRue, Doran, Schad* and *FW/PBS, Inc.*, but this decision is in accord with the vast majority of state and lower federal court decisions decided subsequent to this Court's holding in *Schad*.[3] In fact, even prior to the immediate decision below, the Seventh Circuit had indicated that "entertainment that falls short of anyone's idea of 'art,'" including "topless dancing", is protected under the first amendment unless the "artistic expression is obscene in the legal sense." *Piarowski v. Illinois Community College District 515*, 759 F.2d 625, 628 (7th Cir. 1985).

Petitioners also overstate the effect and breadth of the decision below. First, Petitioners argue that the opinion is not limited to nude dancing "inside bars and 'bookstores' before consenting adults" but extends to "any person who appears nude in any public place, as long as

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[3] *See*, for example, *International Food & Beverage System v. Fort Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986); *Krueger v. City of Pensacola*, 759 F.2d 851, 854 (11th Cir. 1985); *Kev Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir. 1986); *BSA Inc. v. King County*, 804 F.2d 1104, 1107 (9th Cir. 1986); *Walker v. City of Kansas, Mo.*, 691 F. Supp. 1243, 1249 (W.D. Mo. 1988); *Doe v. City of Minneapolis*, 693 F.Supp. 774, 779 n. 12 (D. Minn. 1988), Aff'd. 898 F.2d 612 (8th Cir. 1990); *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n. 3 (2nd Cir. 1974), Aff'd 422 U.S. 922 (1975); *Attwood v. Purcell*, 402 F.Supp. 231, 233-236 (D. Az. 1975); *Mickens v. City of Kodiak*, 640 P.2d 818 (Alaska. 1982); and numerous cases cited, *infra*.

he or she is dancing." Petition, at 12. Petitioners ignore, however, the very language of the judgment and opinion of the Seventh Circuit below. The consideration and decision by the Seventh Circuit was of a very limited nature, that being whether the Indiana "public indecency" statute could be constitutionally applied against *these Respondents*, in *these circumstances* (i.e. dancing as entertainment, indoors, and before a willing audience). This was not a facial overbreadth challenge, as that constitutional issue had been resolved against Respondents in the first decision of the Seventh Circuit in this action. *Glen Theatre, Inc., v. Pearson*, 802 F.2d 287 (7th Cir. 1986) (Petitioners' Appx. 140-147).

Both the judgment below (Appx. 1, *infra*) and the En Banc opinion of the Seventh Circuit indicate that the State of Indiana is enjoined *only* from enforcing its public indecency statute "against these Plaintiffs," and applies neither to any other individuals nor other circumstances. In fact, Judge Flaum, author of the majority opinion, indicated that the Constitution does not preclude the legislature from imposing a ban of nude dancing "upon the public in settings such as streets, parks and beaches." (Petitioners' Appx. 15). Simply stated, the decision of the Seventh Circuit is limited in its holding to bar enforcement of the public indecency statute of Indiana against *these Respondents in these circumstances*; it has no other effect.

Nor, as suggested by the Petitioners, does this decision potentially invalidate "the indecent exposure or

public indecency statutes of 17 states",[4] let alone the Indiana statute at issue. As the basis of the Seventh Circuit decision was a constitutional challenge "as applied," neither the Indiana statute nor the statute of any other state has been *"invalidated"* by the Seventh Circuit's decision. Rather, the scope of a single statute has been limited so as to not impinge upon constitutionally protected expression.

Petitioners also overstate the precedential effect of this decision, even assuming, arguendo, that it goes beyond or expands upon the protections noted by this Court in its decisions. First, it is axiomatic that a decision of a United States Circuit Court of Appeals has precedential force only in the states that comprise that Circuit. Therefore, with the exception of the states of Wisconsin, Illinois and Indiana (those states comprising the Seventh Circuit), the remaining state, district and protectorate statutes (as cited to by the Petitioners in footnote 6 of their Petition) are not affected in any fashion whatsoever by the decision below. In fact, quite to the contrary, many of the statutes as cited by the Petitioners, if affected at all in their potential application to nude dancing as entertainment, are controlled, rather, (in addition to this Court's pronouncements) by decisions of *other* circuit courts of appeals that have similarly concluded that nude

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[4] While Petitioners argue that this decision potentially invalidates indecent exposure or public indecency statutes of "17 states," in addition to the statute of Indiana, Petitioners then list, in footnote 6 of their Petition, the statutes of 23 states, in addition to those of the Virgin Islands and District of Columbia. The significance of this discrepancy, if there is one, is not readily apparent.

dancing as entertainment is a constitutionally protected form of expression.[5] In addition, many of the statutes cited by the Petitioners are dissimilar to the statute at issue and would not, therefore, be necessarily subject to the same constitutional construction[6], while other

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[5] For example, the reach of Conn. Gen. Stat. Ann. Section 53a-186, and Vt. Stat. Ann. Tit. 13, Section 2601 (Supp. 1989) to prohibit nude dancing as entertainment, is controlled not by the Seventh Circuit's decision below, but rather by the Second Circuit's decision of *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21, n. 3 (2d Cir. 1974), aff'd, 422 U.S. 922 (1975).

Similarly, the Eleventh Circuit has, consistent with this Court's opinions, declared that nude dancing is constitutionally protected expression, at least if performed indoors before paying customers and not in a street or park before casual viewers. *International Food & Beverage Systems, supra*, at 1525; see also *Krueger, supra*, at 854. Therefore, Fla. Stat. Ann. Section 800.03 (West.) and Ga. Code Ann. Section 16-6-8 (1981) are limited, if at all, not by the Seventh Circuit decision at issue, but by the prior decisions of the Eleventh Circuit.

Other statutes cited by the Petitioners, including Cal. Penal Code Section 314 (West.), Nev. Rev. Stat. Section 201.220 and Or. Rev. Stat. Section 163.465 (sic) are controlled by similar holdings by the Ninth Circuit in *BSA Inc. v. King County*, 804 F.2d 1104, 1107 (9th Cir. 1986) and *Kev Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir. 1986).

[6] *See*, for example, Ark. Stat. Ann. Section 5-14-112 [precluding only conduct over and above nudity – see discussion, *infra*]; Kan. Stat. Ann. Section 21-3508 (Supp. 1990), with the Kansas Supreme Court acknowledging in *Moody v. Board County Commissioners*, 237 Kan. 67, 697 P.2d 1310, 1316 (1985) that not only is nude dancing a means of expression entitled to First Amendment protections, but that the State statute requires, for proscription, not just nudity but the "intent to arouse or gratify the sexual desires of the offender or another"; Colo. Rev. Stat. Section 18-7-301 [a similar statute]; Wyo. Stat. Section 6-4-201(a) [same]; La. Rev. Stat. Ann. Section 14:106A(1) [precluding not mere nudity, but *obscene* conduct – see discussion, *infra*]; Va. Code Ann. Section 18.2-387 [precluding "*obscene* display or exposure of his person"].

statutes relied upon by Petitioners have been directly, or by implication, limited in their scope to preclude their application to the type of nude dancing at issue here.[7]

Furthermore, while the Seventh Circuit decision would potentially apply to the Illinois "public indecency" statute (Ill. Ann. Stat. Ch. 38, Section 11-9 (Smith Hurd)), and to the Wisconsin "lewd and lascivious behavior" statute (Wis. Stat. Section 944.20), the effect on those

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[7] *See*, for example, Cal. Penal Code Section 314 (West), limited by *In Re Giannini*, 72 Cal. Rptr. 655, 446 P.2d 535 (1968), the seminal case holding that nude dancing as entertainment cannot be prohibited by an indecent exposure statute, and *Morris v. Municipal Court*, 186 Cal. Rptr. 494, 652 P.2d 51 (1982), coming to the same result and overruling an interim decision, *Crownover v. Musick*, 107 Cal. Rptr. 681, 509 P.2d 497 (1973), that had reached an opposite conclusion; Fla. Stat. Ann. Section 800.03 (West), limited by various holdings in that jurisdiction that nude dancing is constitutionally protected expression – see discussion, *infra*; Mass. Gen. L. Ann. Ch. 272, Section 53, limited by the Massachusetts Supreme Court decisions of *Cabaret Enterprises, Inc., v. Alcoholic Beverages Con. Comm.*, 393 Mass 13, 468 N.E.2d 612 (1984) and *Commonwealth v. Sees*, 374 Mass. 532, 373 N.E.2d 1151 (1978), holding "barroom" type nude dancing to be constitutionally protected expression; Minn. Stat. Ann. Section 617.23, limited by the decisions of *Koppinger v. City of Fairmont*, 311 Minn. 186, 248 N.W.2d 708 (Minn. 1976) [indicating that a city ordinance could not constitutionally ban nude dancing in places other than where alcoholic beverages were sold] and *Doe v. City of Minneapolis*, 693 F.Supp 774, 779 (D. Minn. 1988), aff'd 898 F.2d 612 (8th Cir. 1990), [holding that First Amendment protections attach to sexually explicit "live dance entertainment"]; Or. Rev. Stat. Section 163.465 (sic), limited by *State v. Brooks*, 275 Or. 171, 550 P.2d 440, 442-443 (1976) [holding this statute not to apply to nude dancing inside an entertainment establishment before a willing audience – see discussion, *infra*].

statutes by the decision below is meaningless, as those statutes have already been constitutionally limited in their scope.

In *People v. Garrison*, 82 Ill. 2d 444, 412 N.E.2d 483 (1980), the Supreme Court of Illinois, in limiting the reach of its statute to preclude application to activities which are primarily expressive, and, by direct example, to the type of nude dancing at issue here, noted:

> "The statute itself does not disclaim application to operas, ballets, plays or other performances within the protection of the first amendment. Since the statute does not contain obscenity standards acceptable under *Miller v. California*, 413 U.S. 15 (1973), *its validity would be highly suspect if it were applied to activities which implicate first amendment Rights." Id.*, at 487 (emphasis added).

To exemplify this point, the court then immediately cited to the cases of *Doran, supra, Attwood, supra, Salem Inn, Inc. v. Frank*, 381 F.Supp. 859 (1974), aff'd 522 F.2d 1045 (2d Cir. 1975), *City of Revere v. Aucella*, 369 Mass. 138, 338 N.E.2d 816 (1975), and *Koppinger v. City of Fairmont*, 311 Minn. 186, 248 N.W.2d 708 (1976), all cases involving decisions affording constitutional protections to the type of non-obscene nude dancing at issue here. Therefore, the Supreme Court of Illinois has indicated unequivocally that its "public indecency" statute cannot be applied to this type of *nude dancing as entertainment*. The Illinois Court of Appeals has similarly declared that nude dancing is a form of expression which is protected by the first amendment. *City of Chicago v. Hanson*, 105 Ill. App. 3d 1017, 435 N.E.2d 120, 123 (1982), citing *Jamaica Inn, Inc. v. Daley*, 53 Ill. App. 3d 257, 368 N.E.2d 589 (1977), *rev'd on other grounds*, 72 Ill. 2d 415, 381 N.E.2d 694 (1978); and *People v. Better*, 33 Ill. App. 3d 58, 337 N.E.2d 272, 276-277 (1975).

The Wisconsin "lewd and lascivious behavior" statute cited by Petitioners has received similar analysis. The United States District Court in *Reichenberger v. Warren*, 319 F.Supp. 1237 (W.D. Wis. 1970) indicated that, to pass constitutional muster, the term "indecently" as found within the statute, would have to be considered to be equivalent to an analysis of "obscenity", consistent with the elements of such a finding that had been set forth by this Court at that time. *Id.*, at 1238-1239. That court further indicated that "dancing may obviously be a form of expression." See also *Little v. City of Greenfield*, 575 F.Supp. 656, 662 (E.D. Wis. 1983) [holding that "nude dance entertainment is a form of expression within the protective mantle of the first amendment"].

Therefore, the decision of the Seventh Circuit not only does not "potentially invalidate" statutes around the entire country, but it does not even affront the decisions interpreting those statutes that exist in the states in the Seventh Judicial Circuit. Rather, this decision below is consistent with the pronouncements of this Court, and the lower court interpretations of this Court's directives, both at the federal and state levels.

II. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH DECISIONS OF STATE COURTS OF LAST RESORT

To support consideration of this matter by this Court pursuant to Sup. Ct. R. 10.1(a), Petitioners additionally

argue that the decision below is in conflict with the decisions of various state courts of last resort. Petitioners cite ten decisions of various state appellate courts that are claimed to establish this conflict, including two cases decided by the Indiana Supreme Court.

Almost without exception, the cases cited to by the Petitioners predate this Court's statement in *Schad, supra,* that nude dancing was not without first amendment protection from official regulation. *Id.* at 66. Therefore, to the extent that any of the cited decisions reach a conclusion opposite to that below, those decisions are not in conflict with the Seventh Circuit holding, but, are, rather, in conflict with this Court's statement in *Schad*. It is, indeed, illogical to argue that outdated decisions that have been limited by *Schad*, create a conflict with the Seventh Circuit decision below which, in fact, follows *Schad*, such as to invoke jurisdiction of this Court.

Even though the present precedential value of the decisions cited by Petitioners is suspect alone to the extent that they predate *Schad*, further discussion of these decisions is warranted, as Petitioners have failed to apprise this Court of subsequent judicial developments affecting a number of these decisions, and have further misrepresented the holding of many of the decisions that they cite. Sup. Ct. R. 15.1.

Petitioners first rely upon the two Indiana Supreme Court decisions of *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1980) and *Dove v. Indiana*, 449 U.S. 806 (1980), and *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984), arguably the most applicable decisions to this action.

First, *Erhardt* (a three to two decision) does not discuss the constitutional issues of nudity or nude dancing, but, rather, relies upon the Indiana Supreme Court's prior decision in *Baysinger*. See *Erhardt, supra,* at 225-226, and in particular, the dissenting opinions of Hunter, J., and DeBruler, J. Yet, the continued validity of *Baysinger* is called into question by this Court's subsequent decision in *Schad*. More importantly, however, is the simple fact that *Baysinger* involved only a facial overbreadth constitutional attack, *Id.*, 397 N.E.2d at 587, which is not applicable to the "as applied" limited holding at issue here. In fact, in its initial holding in this action, the Seventh Circuit United States Court of Appeals concluded that, consistent with *Baysinger*, the Indiana public indecency statute was not *facially* overbroad. *Glen Theatres, supra* (Petitioners' Appx. 144-146).

Turning then to decisions outside of the State of Indiana, Petitioners cite as the "leading decision" that nude dancing is "conduct, not speech," the Oregon Supreme Court decision of *City of Portland v. Derrington*, 253 Or. 289, 451 P.2d 111, 113-114, (1969), *cert. denied*, 396 U.S. 901 (1969). *Derrington* not only predates *Schad*, but it was decided even before this Court's pronouncements in *LaRue*, and *Doran*. Thus, in deciding *Derrington*, the Oregon Supreme Court did not have the benefit of this Court's reasoning and rationale in those cases that first amendment protections do apply to nude dance entertainment. In addition, it is not insignificant that the legislation upheld in *Derrington* was not a state "indecent exposure" statute, but was, rather, a city ordinance precluding women from baring their breasts in a place where

food or alcoholic beverages were served. *Id.*, 451 P.2d, at 112.

Had *Derrington* been decided after *Doran*, history indicates that the result in that decision would, most likely, have been different. Just one year after this Court's holding in *Doran*, the Oregon Supreme Court interpreted the State's "public indecency" statute, ORS 163.465, *not to apply* to dancing as entertainment before a willing audience. *State v. Brooks*, 275 Or. 171, 550 P.2d 440, 442-443 (1976). Similarly, the Oregon Court of Appeals, in addressing a city "indecent exposure" ordinance, subsequently noted that, pursuant to *Brooks*, there is a differentiation between presentations "performed before an audience" and conduct occurring in "places where an unwilling public may be subjected to 'unwanted or shocking displays.'" *City of Portland v. Gatewood*, 76 Or. App. 74, 708 P.2d 615, 619 at fn. 4 (1985), *rev. denied*, 700 Or. 477, 713 P.2d 1058 (1986). That court noted that it is "the latter kind of nudity [acts occurring in places where an unwilling public may be subjected to 'unwanted or shocking displays'] which the ordinance seeks to prevent." *Id.*, at 619 fn 4 (clarification added). The *Gatewood* court upheld the city indecent exposure statute at issue there by limiting its reach to only *non-protected* (i.e. non-expressive) public nudity. *Id.*, at 620.

Finally, any continuing authority that *Derrington* may still have considered to possess in light of *Brooks*, has been eviscerated by the decision of *Sekne v. City of Portland*, 81 Or. App. 630, 726 P.2d 959 (1986). In considering the constitutionality under the Oregon Constitution of two Portland city ordinances that prohibited nudity in taverns and restaurants, the Oregon Court of Appeals

held that nude dancing was, in fact, "expression" entitled to constitutional protection, *id.*, at 962-963, and, while distinguishing *Derrington* as not having evaluated the ordinance there pursuant to state constitutional protections, noted that:

> "The cases cited from other jurisdictions, which uniformly reject the speech/conduct dichotomy, raise serious questions as to the continued validity of *Derrington*'s reasoning under the First Amendment." *Id.*, at 962 fn. 3.[8]

The *Sekne* court then, pursuant to its conclusion that nude dancing was protected expression, declared one ordinance invalid under the State Constitution, and, to save the other, construed it, consistent with *Gatewood*, so as to not apply to nude dancing as entertainment. Without such a narrowing construction, explained the court, the ordinance would have prohibited activity which was protected expression, and would thus be overbroad. *Id.*, at 964.

The decisions in *Brooks*, *Gatewood* and *Sekne* represent the current law in the State of Oregon, are consistent with this Court's decisions, and render *Derrington* a nullity. The law in Oregon today, is not, therefore, in conflict with the Seventh Circuit decision below, but is, rather, totally consistent with it.

Petitioners next cite *Hoffman v. Carson*, 250 So.2d 891 (Fla. 1971), *appeal dismissed for want of substantial federal*

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[8] *Derrington*'s reasoning can also be distinguished as that ruling was based not exclusively on nude dancing, but also upon nudity of attendants, waitresses and other employees; i.e., non-expressive nudity. *Derrington, supra*, at 113.

question 404 U.S. 981 (1971). Again, it is not insignificant that this decision was rendered prior to this Court's pronouncements in *Schad, Doran,* and even a year before *LaRue*. Nor is it insignificant that the decision in *Hoffman* was predicated upon the Oregon Supreme Court's decision in *Derrington, supra,* which, as discussed above, has, for all practical purposes, been overruled by subsequent case law.

Hoffman also is distinguishable as its ruling precludes a determination of statutory violation upon a finding of mere nudity, but, rather, requires a "lascivious exhibition" *id.*, at 893, which is more akin to a finding of obscenity. *See,* for example, *Goodmakers v. State,* 450 So.2d 888, 890-891 (2d DCA 1984), and *Duvallon v. State,* 404 So.2d 196, 197 (1st DCA 1981).

In addition, in a string of decisions considering the constitutionality of a number of Florida ordinances banning nudity and/or nude dancing, the Eleventh Circuit Court of Appeals has consistently indicated that, in compliance with this Court's pronouncements as set forth above, nude dancing is "expression" warranting constitutional protection. *International Food & Beverage Systems, supra,* at 1525; *Krueger, supra,* at 854; and *Grand Faloon Tavern Inc. v. Wicker,* 670 F.2d 943, 946-947 (11th Cir. 1982), *cert. denied,* 459 U.S. 859 (1982). See also *Function Junction, Inc., v. City of Daytona Beach,* 705 F.Supp. 544, 550 (M.D. Fla. 1988), holding that nude dancing is protected expression under the first amendment. Thus, the *Hoffman* decision has little, if any, relevance today.

Petitioners next contend that *Major Liquors, Inc. v. City of Omaha,* 188 Neb. 628, 198 N.W.2d 483 (1972) is in

conflict with the Seventh Circuit decision, and argue that "[t]he holding did not turn on the fact that alcoholic beverages were served on the premises."[9] Petition, at page 15. Petitioners are, however, in error on this point. First, the ordinance at issue in *Major Liquors, Inc.* was not, as here, an "indecent exposure" law, but was, rather, an ordinance allowing for the revocation of a liquor license if topless dancing by a female was permitted on the premises. *Id.*, at 484.

In addition, the opinion of the Nebraska Supreme Court is almost an exclusive discussion of the inherent powers of the state to regulate the sale of alcohol pursuant to the twenty-first amendment. *Id.*, at 485-487. Indeed, the simple issue for and the decision of the Nebraska Supreme Court is stated as follows:

> "Is the restriction against females dancing when 'topless' or semi-nude an unreasonable regulation of *businesses engaged in dispensing alcoholic liquors*? We conclude that it is not." *Id.*, 486-487 (emphasis added).

Major Liquors Inc. is, therefore, directly in line with this Court's pronouncements in *LaRue, Bellanca,* and *Iacobucci.* However, as the statute at issue here is not predicated upon the state's inherent power under the twenty-first amendment, and since Respondents, here, were not involved in the sale or dispensing of alcoholic

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[9] This decision is, of course, relevant in a discussion as to whether a state can ban nudity or nude dancing in establishments that serve alcoholic beverages pursuant to its inherent powers under the Twenty-first Amendment. See discussion, *supra.*

beverages, the decision of *Major Liquor, Inc.* is not applicable to the Seventh Circuit's decision, nor in conflict with it.

Petitioners next cite *Robinson v. State*, 253 Ark. 882, 489 S.W.2d 503 (1973). Not only was this case decided prior to this Court's decisions of *Schad* and *Doran*, and is, therefore, in conflict with them, but the "indecent exposure" statute at issue in *Robinson* has been replaced. See Ark.Stat.Ann. Section 5-14-112. That statute[10] has been subsequently discussed and interpreted[11] by the Arkansas Supreme Court in *Young v. Arkansas*, 286 Ark. 413, 692 S.W.2d 752 (1985), *cert. denied*, 474 U.S. 1070 (1986). In *Young*, the Defendant there had argued that her conduct was "mere nude dancing" and therefore entitled to first amendment protection. The Arkansas Supreme Court noted:

> "We do not take issue with that contention, except to note that the statute and activity in this case *do not deal merely with nudity or nude dancing, but with something more as proscribed by the statute*. Appellant makes no argument that the proscribed activity under the statute is entitled to First Amendment protection, only that

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[10] Ark.Stat.Ann. Section 5-14-112 states, in part: (a) a person commits indecent exposure if, *with purpose to arouse or gratify the sexual desire of himself or any other person*, he exposes his sex organs: (1) in a public place or public view; or (2) under circumstances in which he knows his conduct is likely to cause affront or alarm. * * * (Emphasis added).

[11] *Young*, actually interprets a predecessor statute, Ark.Stat.Ann. Section 41-1812, which, with the exception of renumbering the subsections, is virtually identical to the present statute.

> mere nude dancing is entitled to such protection. As we have said, appellant's conduct in this case was not simple nudity, but conduct that came within the proscriptions of Ark.Stat.Ann. Section 41-1812. As we hold appellant's conduct *not to be mere nudity*, and since appellant does not argue the proscribed activity under the statute is constitutionally protected, there is no need to address the remaining aspects of the arguments." *Id.*, at 754 (emphasis added).

Even Petitioners here acknowledge that *Young* is distinguishable from this action as the dancer, in *Young*, "arguably performed an obscene dance . . . ". Petition, at 14. Thus, the Supreme Court of Arkansas has, subsequent to *Robinson*, followed the precedent of this Court by indicating that non-obscene nude dancing is constitutionally protected. The present judicial interpretation in Arkansas is, therefore, not in conflict with the Seventh Circuit decision below.

Petitioners also rely upon the decision of the Supreme Court of Maine in *Gabriele v. Town of Old Orchard Beach*, 420 A.2d 252 (Me. 1980). It is of interest that *Gabriele* was decided between this Court's dismissal of the appeals in *Baysinger*, and its subsequent decision in *Schaa*. Thus, the *Gabriele* court was not provided with this Court's specific direction in *Schad* that nude dancing is imbued with constitutional protections under the first amendment. More importantly, however, is the simple fact that the ordinance at issue in *Gabriele* regulated, like *Major Liquors, Inc., supra*, nudity in businesses licensed to sell alcoholic beverages. *Id.*, at 253-254.

Significantly, the *Gabriele* court relied upon this Court's decisions in *LaRue* and *Doran* indicating that, pursuant to the inherent powers to regulate the sale of liquor conferred by the twenty-first amendment, states could ban nude dancing in establishments that serve alcohol. *Id.*, at 254-255. Indeed, the decision in *Gabriele* states:

> "Hence, in the circumstances of the instant case the prohibition of nude dancing presented as live entertainment in plaintiff's tavern *was an exercise of powers conferred by the Twenty-first Amendment which did not transgress the independent protections afforded speech or expression by the First-Fourteenth Amendments.*" *Id.*, at 257 (emphasis added).

Petitioners are therefore in error when they state that the court's conclusion in *Gabriele* was based "primarily on the nature of the dancing." Rather, it was based, as that Court expressly stated, upon the authority of the twenty-first amendment, which is not at issue here.

Petitioners also cite two cases from Louisiana, *State v. Walters*, 440 So.2d 115 (La. 1983), and *State v. Jacobson*, 459 So.2d 1285 (La. App. 1984), *writ denied*, 463 So.2d 599 (La. 1985), claiming that those courts had found no first amendment violation in applying Louisiana's *"indecent exposure"* statute to women exhibiting their genitals in glass booths without music, or to nude dancers. Petition, at 16 (emphasis added). Petitioners are in error as to the nature of the statute involved in those cases. Both prosecutions were premised upon the Louisiana *obscenity*

statute, LSA-R.S. 14:106,[12] and not upon a statute, as here, rendering simple "public nudity" a crime. Therefore, these two decisions are inapplicable to the circumstances at issue in this case for the same reason that Petitioners acknowledge *Young v. Arkansas, supra,* to be irrelevant; that being that the conduct in those cases went beyond mere nudity or dancing, and transgressed into the arena of obscenity. In fact, the Louisiana Supreme Court noted in *Walters* that it was *not* deciding constitutional questions regarding the State's right to regulate all forms of live conduct, including legitimate dance by naked persons. *Id.*, at 122. In addition, as acknowledged by the Petitioners, *Walters* did not even involve dance, hence did not involve "expression", and therefore is irrelevant in any comparison to this action.

Finally, Petitioners note the Michigan Court of Appeals decision of *People v. Wilson*, 95 Mich. App. 440, 291 N.W.2d 73 (1980), *leave to appeal denied*, 409 Mich. 925 (1980), stating that that court had concluded that Michigan's indecent exposure statute could be constitutionally applied to nude dancing because it was not designed to prohibit speech. While there is no question that the prosecution in *Wilson* was brought pursuant to the Michigan

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[12] That statute states, in part:

"A. The crime of obscenity is the intentional:

(1) Exposure of the genitals, pubic hair, anus, vulva, or female breast nipple in any public place or place open to the public view *with the intent of arousing sexual desire which appeals to prurient interest or is patently offensive.*" * * * (Emphasis added).

indecent exposure statute, M.C.L. Section 750.335a, it is similarly clear that the conduct discussed in *Wilson* was not mere "nude dancing", but was rather determined by the Michigan Court of Appeals to be *obscene* conduct.[13] Therefore, similarly, this case has no relevance to the action at issue which involves mere nude dancing.

Yet, *Wilson* is inapplicable here for another reason, as the Defendant in *Wilson* had constitutionally challenged the statute only "on its face" and not, as here, as applied. The Michigan Court of Appeals noted, in rejecting this facial overbreadth challenge, that there were "a substantial number of situations to which the statute can validly be applied and that there is no substantial overbreadth." *Id.*, at 75. Similarly, as indicated above, the Seventh Circuit here, in its initial decision to this matter, concluded that the instant statute at issue here was not *facially* overbroad. *Glen Theatres, supra* (Petitioners' Appx. 144-146). Conversely, upon remand, the constitutional *application* of the Indiana Statute was the sole issue to be decided, and the overbreadth later found by the Seventh Circuit was only *as applied* to the type of nude dancing at

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[13] "At the hearing held on the Motion to Quash, Plaintiff stated that the charge was brought *not for nude dancing* but rather for the on-stage act of masturbation." *Id.*, at 73. The State further argued that the conduct "was clearly 'hard core' sexual conduct and hence not entitled to any First Amendment protection." *Id.*, at 74. "The State has valid interests which it can seek to protect by the regulation of commercialized *obscenity*." *Id.*, at 74 (emphasis added). "The alleged conduct of the Defendant in this case is *'hard core' sexual conduct* which can constitutionally be prohibited by the State." *Id.*, at 74 (emphasis added).

issue. Petitioners reliance upon *Wilson* is therefore erroneous.

For the reasons as set forth above, the En Banc decision of the Seventh Circuit below is not in conflict with any relevant decision of a state court of last resort that still retains precedential value.

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

KLEIN & SHAFER, P.C.

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APPENDIX

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2. Affidavit of Gayle Ann Marie Sutro..... App. 3

APPENDIX I

UNITED STATED COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: May 24, 1990

BEFORE: Honorable William J. Bauer, Chief Judge
Honorable Walter J. Cummings, Circuit Judge
Honorable Harlington Wood, Jr., Circuit Judge
Honorable Richard D. Cudahy, Circuit Judge
Honorable Richard A. Posner, Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorable Joel M. Flaum, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge

No. 88-3006

DARLENE MILLER, et al.,

Plaintiffs – Appellants

v.

CIVIL CITY OF SOUTH BEND, et al.,

Defendants – Appellees

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division
No. 85 C 598, Judge Allen Sharp

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this Court that the judgment of the District Court in this cause appealed from be, and the same

is hereby, REVERSED, with costs, and the State is enjoined from enforcing its public indecency statute against these plaintiffs, in accordance with the opinion of this Court filed this date.

APPENDIX II

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLEN THEATRE, INC., et al., Plaintiffs, vs. CIVIL CITY OF SOUTH BEND, et al., Defendants.	)	CAUSE NUMBER S85-0353

AFFIDAVIT OF GAYLE ANN MARIE SUTRO

Comes now Gayle Ann Marie Sutro and having been duly sworn does depose and say as follows:

1. I am one of the plaintiffs herein.

2. I am a professional actress, stunt woman, and ecdysiast who has danced, modeled, and acted professionally for a period in excess of 15 years.

3. I have degrees from West Valley College in Saratoga, California (1975), San Jose State College (1978), the Los Gatos Academy of Dance, and the Marne Jones Modeling School in San Jose, California.

4. I have studied acting, dance (including ballet, jazz, tap, and exotic dance), and speech and languages.

5. I am a current member in good standing of the Screen Actors Guild, the Screen Extras guild, and AFTRA.

6. My theatrical and television credits include performances as an actress and stunt woman in movies

including Night Shift, Blues Brothers, and several adult films.

7. My acting and stunt woman work has included performances on several prime-time network television programs, including Love Boat, Magnum, P.I., the Fall Guy, McClain's Law, the Jefferson's, Charlie's Angels, Hart to Hart, Flamingo Road, Fantasy Island, and Riptide.

8. I have an extensive modeling career and have modeled for photographs in such magazines as Penthouse, Shape, Fitness, and New Body.

9. I have performed professionally in live theatrical productions and live stage shows in numerous theatres throughout the United States, and I have as an integral part of my dance removed my clothes and danced nude in an art form I consider to be artistic.

10. My nude dance performances are appropriately choreographed and are an attempt to communicate as well as to entertain.

11. I have scheduled, through my agent and plaintiff Glen Theatre, Inc., to make a personal appearance in conjunction with a South Bend area showing of one of my motion picture films at the Chippewa Drive-In.

12. I have agreed to perform at the Chippewa Drive-In in South Bend, St. Joseph County, Indiana, my dance production at various times and days throughout the summer and fall of 1985 commencing with the week of July 15, 1985.

Further affiant saith not.

/s/ Gayle Ann Marie Sutro
Gayle Ann Marie Sutro

STATE OF INDIANA)
) SS:
ST. JOSEPH COUNTY)

Subscribed and sworn to before me, a Notary Public residing in said County and State this 8th day of July, 1985.

/s/ Cathy DeMarco
Cathy DeMarco,
Notary Public

My commission expires:

August 17, 1987

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing AFFIDAVIT OF GAYLE ANN MARIE SUTRO upon Mr. Robert C. Rosenfeld, Assistant City Attorney, Office of City Attorney, County-City Building, South Bend, Indiana, 46601; and Mr. William Daily, Deputy Attorney General, Office of Attorney General, 219 State House, Indianapolis, Indiana, 46204, by United States mails, first class postage prepaid, this 8th day of July 1985.

/s/ Cathy DeMarco for
Charles A. Asher